

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HDI-GERLING INDUSTRIE
VERSICHERUNG AG,

Plaintiff,

v.

PACIFIC DISTRIBUTION SERVICES
LLC,

Defendant.

CASE NO. 3:10-cv-05105-RJB

ORDER ON DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

This matter comes before the court on Defendant Pacific Distribution Services LLC's Motion for Summary Judgment (Dkt. 18). The court has considered the pleadings filed in support of and in opposition to the motions and file herein.

Factual and Procedural History

On February 12, 2010, Plaintiff filed a complaint for damages allegedly resulting from Defendant's handling of the Plaintiff's cargo. Dkt. 1. The complaint asserts that Plaintiff's

1 insureds, Rothfos and InterAmerican Coffee Company (“IAC”),¹ stored green coffee beans in
2 Defendant’s warehouse and that the beans were damaged during storage due to Defendant’s
3 negligence. *Id.* Plaintiff alleges that Defendant was negligent and careless in its handling of
4 Plaintiff’s cargo, breached its duties and obligations as warehouseman and a bailee of the cargo,
5 and was otherwise at fault. *Id.* On June 23, 2010, Defendant filed its answer, and requested that
6 the complaint be dismissed with prejudice. Dkt. 7.

7 In January 2009, the insureds had 9,316 bags of coffee beans stored with Pacific
8 Distribution Services LLC (“PDS”) in a warehouse located at 3601 142nd Avenue East, Sumner,
9 Washington. Dkt. 18; Dkt. 22. The record is silent as to the terms of any contract between the
10 insureds and PDS. The parties agree that the insureds did not provide the Defendant with
11 instructions on how to store the coffee beans. *Id.* The parties also agree that the warehouse was
12 not climate controlled aside from freeze protection that was provided as needed from heaters
13 mounted closely to the roof of the warehouse. *See* Dkt. 18. The stacks of beans were stored in
14 pallets; pallets generally contained 20 bags stowed with five bags per tier and four tiers high.
15 *See Id.*

16 Coffee beans were shipped from various locations, such as Guatemala and Columbia, to
17 Pacific Distribution who accepted the shipments for the insureds. Dkt. 21. Plaintiff contends
18 that the coffee beans and their bags were in good condition when they arrived and were accepted
19 by Pacific Distribution. Dkt. 1. Defendant contends that there is no evidence to suggest that the
20 coffee beans or their bags were in good condition on arrival. Dkt. 18. There is no evidence that
21 Defendant took exception to the condition of the coffee upon receipt. Dkt. 21.

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24 ¹ This is a subrogation lawsuit filed by insurer HDI-Gerling Industrie Versicherung AG (“HDI-Gerling”).

1 The insureds first learned of the damaged condition of the coffee beans when a customer
2 in New Orleans notified them that it received a discolored shipment. Dkt. 21. In response,
3 representatives of PDS, Rothfos, IAC, and their respective insurers conducted an inspection of
4 Defendant's warehouse. Dkt. 21. During the inspection, the parties present noted that although
5 an earlier inventory reflected that 9,916 bags were stored in the warehouse, there were only
6 9,316 bags present. Dkt. 21. At the conclusion of the inspection, the parties present agreed
7 upon, and signed, the following statement:

8 "On November 4 and 5, 2009, we examined randomly selected
9 samples of aforementioned inventories and noted the following.

10 All exposed bag surfaces showed discoloration including bottom
11 layer bags. On bottom layers the pallet pattern was evident: where
12 bags had been in contact with the pallet wood, the material was not
13 discolored; where bags were exposed to air between pallet slats,
14 discoloration was found.

15 Corresponding patterns of discoloration were observed on the
16 coffee beans as well. All coffee adjacent to exposed areas of bags
17 were found to show discoloration to a depth of 1" to 2". Other
18 coffee in the bags was affected to a lesser degree.

19 We examined samples with received dates ranging from September
20 2004 to October 2009. The degree of discoloration appeared to
21 correlate to the length of storage, i.e. the most recently received
22 beans showed no to slight discoloration. Coffee beans in storage
23 for approx. 6 weeks or longer showed clear signs of discoloration.
24 Discoloration conditions found became progressively more
pronounced the longer the storage period." See Dkt. 21-2.

19 Plaintiffs contend that the damage to the beans was a result of the conditions in
20 Defendant's warehouse (*see* Dkt. 1) while Defendant contends that the damage is a result of
21 oxidation of fatty acids in the beans (involving exposure to oxygen) that is an effect of the beans
22 aging (*see* Dkt. 22).

1 Defendant's representative at the inspection, Edward F. Travers & Associates, Inc.,
2 Marine Surveyors and Cargo Consultants, agreed with the joint statement and advised Defendant
3 in a separate report to hire an industrial hygienist to inspect the air quality in the warehouse and
4 evaluate whether any other contaminants might be present. Dkt. 20-3. Defendant heeded this
5 advice and hired MDE, Inc. ("MDE"), a company with experience in forensic chemical analysis
6 and industrial hygiene to inspect the warehouse. In November 2009, MDE inspected the
7 warehouse and coffee beans in storage and sampled the warehouse air for contaminants
8 including "volatile organic compounds such as formaldehyde, and also for bacteria and fungi."
9 Dkt. 18 at 5. MDE reported that it did not find contaminants in the warehouse. Dkt. 20-4.

10 One of Plaintiff's representatives at the joint inspection was Haverie-Büro Berner,
11 Independent Cargo Surveyors, who Plaintiff hired to inspect the warehouse. Haverie-Büro
12 Berner conducted an independent analysis and issued a preliminary report in November 2009
13 (Dkt. 21-2) and updated reports in January 2010 (Dkt. 21-3) and April 2010 (Dkt. 21-4). The
14 April 2010 report states that the cause for the damage is still under investigation and that "[a]ll
15 results which are available up until now are not enough at this stage that chemists would be in a
16 position yet, to explain the phenomena." Dkt. 21-4.

17 As a result of the damage found, HDI-Gerling paid a claim submitted by IAC in the
18 amount of US\$457,630.56 and a claim submitted by Rothfos in the amount of US\$248,453.29.
19 Dkt. 21. By virtue of these payments, HDI-Gerling became subrogated to the rights of Rothfos
20 and IAC. *Id.*

21 Motion for Summary Judgment

22 On February 3, 2011, Defendant filed Defendant Pacific Distribution Services LLC's
23 Motion for Summary Judgment (Dkt. 18), contending that it is entitled to judgment as a matter of
24

1 law because Plaintiff cannot show a genuine issue of material fact. Defendant contends that
2 Plaintiff cannot show either that PDS breached its duty of care, or that any such breach caused its
3 damage. Dkt. 18. Defendant argues that Plaintiff's negligence claim is not sufficient to survive
4 summary judgment because (1) there is no evidence to suggest that the raw beans were fresh
5 when they arrived at the warehouse, and (2) there is no evidence to suggest that any act or
6 omission of PDS caused the damage to the coffee. *Id.*

7 On February 22, 2011, Plaintiff filed Plaintiff's Opposition to Defendant's Motion for
8 Summary Judgment (Dkt. 21). Plaintiff argues that there are genuine issues of material fact
9 concerning Defendant's breach of the duty of care imposed on it as a warehouseman. Dkt. 21.
10 Plaintiff argues, and its expert opines, that the damage that occurred to the coffee beans "were
11 not of a nature that would ordinarily be encountered with coffee" and "were unrelated to aging or
12 any other inherent property of the coffee." *Id.* at 4. Plaintiff contends that the damage would not
13 have occurred, or would have been minimized, if PDS had not breached its duty to safeguard the
14 cargo by either (1) maintaining a better environment for storage, or (2) notifying the insureds of
15 visible damage that PDS should have observed. *Id.* Plaintiff further argues that even if aging
16 were the cause of the damage, that natural cause would not have alleviated PDS' duty to
17 safeguard the coffee. *Id.* at 7.

18 On February 25, 2011, Defendant filed Pacific Distributions Services' Reply on Motion
19 for Summary Judgment (Dkt. 22). Defendant argues that the Court should strike the opinions of
20 the Plaintiff's expert, Markus Helms, as discussed below. *Id.* Further, Defendant argues that
21 Plaintiff has not presented any evidence that negligence by PDS caused the damage to the coffee
22 beans. *Id.*

23 Motion to Strike Material in Plaintiff's Response
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1 In anticipation of the Defendant's objection to the Plaintiff's expert witness' opinions, the
 2 Plaintiff argues that no expert testimony is needed to prove its negligence claim. Dkt. 22 at 6.
 3 The Plaintiff contends that whether PDS' omissions amounted to a breach of its duty of care is a
 4 determination that can be made on the basis of common knowledge and no expert testimony is
 5 required. *Id.*

6 Defendant argues that the Court should strike the opinions of the Plaintiff's expert,
 7 Markus Helms. Dkt. 22. First, Defendant argues that Mr. Helms does not have adequate
 8 qualifications, or proof of such qualifications, to qualify him as an expert able to make the
 9 following assertions: (1) that the damage to the coffee was not the result of aging, (2) that the
 10 discoloration was caused by conditions present in the warehouse, and (3) that PDS should have
 11 discovered the damage to the coffee. *Id.* at 2-5. Second, Defendant argues that the Court should
 12 strike the following statements made by Mr. Helms that are not supported by the facts: (1) that
 13 the coffee was undamaged when received at the warehouse, and (2) that the removal of the
 14 coffee from the warehouse would have had the effect of reducing the damage. *Id.* at 5-6.

15 Standards

16 *1. Standard for Motion to Strike Material in Plaintiff's Response*

17 If the witness is not testifying as an expert, the witness' testimony in the form of opinions
 18 or inferences is limited to those opinions or inferences which are (a) rationally based on the
 19 perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the
 20 determination of a fact in issue, and (c) not based on scientific, technical, or other specialized
 21 knowledge within the scope of Rule 702. F.R. Evid. 701. If scientific, technical, or other
 22 specialized knowledge will assist the trier of fact to understand the evidence or to determine a
 23 fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or
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1 education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is
2 based upon sufficient facts or data, (2) the testimony is the product of reliable principles and
3 methods, and (3) the witness has applied the principles and methods reliably to the facts of the
4 case. F.R. Evid. 702.

5 2. *Standard for Summary Judgment*

6 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
7 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
8 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is
9 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
10 showing on an essential element of a claim in the case on which the nonmoving party has the
11 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
12 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
13 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
14 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some
15 metaphysical doubt.”); *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a
16 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
17 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
18 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
19 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

20 When considering a motion for summary judgment, the court must view all evidence in a
21 light most favorable to the nonmoving party and must draw all reasonable inferences in that
22 party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

1 The elements of negligence are (1) a legal duty requiring the actor to conform to a certain
 2 standard of conduct, for the protection of others against unreasonable risk, (2) a failure to adhere
 3 to this reasonableness standard, (3) a causal connection between the conduct and the injury, and
 4 (4) actual loss or damage. *Flying Diamond Corp. v. Pennaluna & Co., Inc.*, 586 F.2d 707, 713
 5 (9th Cir. 1978). In Washington, where perishable goods have sustained damage in storage,
 6 negligence cannot be presumed from the mere fact of damage. *Van Nostern v. Richey & Gilbert*
 7 *Co. et al.*, 2 Wn.2d 663, 665 (1940). In such cases the plaintiff must affirmatively prove the
 8 warehouseman's negligent act or omission causing the damage. *Id.* The Washington Uniform
 9 Commercial Code defines the warehouseman's duty as follows:

10 A warehouse worker is liable for damages for loss of or injury to
 11 the goods caused by his or her failure to exercise such care in
 12 regard to them as a reasonably careful person would exercise under
 13 like circumstances but unless otherwise agreed he or she is not
 14 liable for damages which could not have been avoided by exercise
 15 of such care. RCW 62.A.7-204.

16 The Washington State Supreme Court has found that it is a question for the trier of fact when
 17 there are questions regarding the condition of perishable goods upon delivery to a warehouse
 18 when the bailor of the goods was not present and the bailor claims that the bailee has not
 19 exercised due care in caring for those goods. *See Smith v. Diamond & Ice Storage Co.*, 65 Wn.
 20 576, 579 (1911).

21 Discussion

22 *1. Discussion of Motion to Strike Material in Plaintiff's Response*

23 Plaintiff's expert, Marcus Helms of Haverie-Büro Berner, Independent Cargo Surveyors,
 24 testifies beyond his personal observations of the coffee beans and provides testimony based on
 scientific, technical, or other specialized knowledge. As such, Mr. Helms provides expert
 opinion in his declaration. At this stage, Mr. Helms appears qualified to provide expert opinion

1 because he has worked as a surveyor and Managing Director of Haverie-Büro Berner, a company
2 that provides independent cargo surveyors, not unlike the cargo consultants that Defendant
3 likewise hired to provide expert opinion in this case. Mr. Helms lists his experience with
4 Haverie-Büro Berner in his declaration (Dkt. 21-1).

5 Moreover, although Mr. Helms appears to base his opinions on relatively few facts, these
6 facts are adequate to allow his declaration to stand. Accordingly, the Defendant's Motion to
7 Strike Material in Plaintiff's Response (Dkt. 18) should be denied.

8 *2. Discussion of Motion for Summary Judgment*

9 In this case there remain a few disputed facts that should be submitted to the trier of fact.
10 First, the parties dispute the condition of the coffee beans when they arrived at, and were
11 received by, PDS. Second, the parties dispute whether the coffee beans discolored due to aging
12 or whether the coffee beans discolored due to exposure in the warehouse. Third, the parties
13 dispute whether PDS had a duty to further protect the coffee or otherwise notify the insureds of
14 the damage. Finally, the parties dispute whether the removal of the coffee from the warehouse
15 would have had the effect of reducing the damage. These disputes are not properly decided at
16 the summary judgment stage. Accordingly, Defendant Pacific Distribution Services LLC's
17 Motion for Summary Judgment (Dkt. 18) should be denied.

1 Therefore, it is hereby **ORDERED** that Defendant's Motion to Strike Material in
2 Plaintiff's Response (Dkt. 18) is **DENIED** and Defendant Pacific Distribution Services LLC's
3 Motion for Summary Judgment (Dkt. 18) is **DENIED**.

4 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
5 to any party appearing pro se at said party's last known address.

6 Dated this 8th day of March, 2011.

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9 ROBERT J. BRYAN
10 United States District Judge
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